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Nos. 86-239 and 86-608

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL.,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE NATURAL RESOURCES DEFENSE COUNCIL

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that Sections 307(b)(1) and 405 of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345, prohibit EPA from relaxing national pretreatment standards through removal credits without promulgating the sludge regulations which are a precondition to credits.

2. Whether the Third Circuit correctly held that Section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1), authorizes removal credits only for pollutant removal which meets the same standard of consistency that a direct discharger must meet.

PARTIES

In addition to those named in the caption, the parties are: Illinois Manufacturers' Association and Mid-America Legal Foundation (petitioners in No. 86-608) and the U.S. Environmental Protection Agency (respondent).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATUTE AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITIONS	3
1. THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION	4
2. THE THIRD CIRCUIT CORRECTLY DECIDED THAT IT HAD JURISDICTION TO REVIEW THESE RULES	8
3. THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE CLEAN WATER ACT PROHIBITS EPA FROM APPROVING REMOVAL CREDITS IN TOTAL DISREGARD OF SECTION 405 OF THE ACT	10
4. THE THIRD CIRCUIT CORRECTLY DECIDED THAT EPA CANNOT AUTHORIZE REMOVAL CREDITS WHICH DIRECTLY VIOLATE SECTION 307(b)(1) OF THE CLEAN WATER ACT	13
CONCLUSION	15
APPENDIX	

TABLE OF AUTHORITIES

CASES: Page

Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984) 9

Chemical Manufacturers Ass'n. v. NRDC, 470 U.S. 116 (1985) ..... *passim*

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)..... 10

General Motors Corp. v. EPA, 738 F.2d 97 (3d Cir. 1984) 8

Motor Vehicle Manufacturers' Ass'n. of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983)..... 10

National Ass'n. of Metal Finishers v. EPA, 719 F.2d 624 (3d Cir. 1983), rev'd in part, *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985)..... 2, 4

NRDC v. Thomas, Civ. Nos. 2153-73, 75-012, 75-1698, 75-1267 (D.D.C., Jan. 7, 1987)..... 6

Pennsylvania Dep't. of Environmental Resources v. EPA, 618 F.2d 991 (3d Cir. 1980)..... 4

Tanner's Council of America, Inc. v. Train, 540 F.2d 1188 (4th Cir. 1976) 9

STATUTES:

Administrative Procedure Act, 5 U.S.C. 553 4
Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*. . 1
§301(a), 33 U.S.C. 1311(a) 13
§301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B)..... 13
§307(b), 33 U.S.C. 1317(b).....8, 13
§307(b)(1), 33 U.S.C. 1317(b)(1) ..... *passim*
§402, 33 U.S.C. 1342 13
§405, 33 U.S.C. 1345..... *passim*
§405(d), 33 U.S.C. 1345(d) ..... *passim*
§405(e), 33 U.S.C. 1345(e)..... 12, 13
§505(a)(2), 33 U.S.C. 1365(a)(2)..... 4

TABLE OF AUTHORITIES—*(Continued)*

STATUTES: Page

§509(b)(1), 33 U.S.C. (Supp. II) 1369(b)(1) 8, 9
§509(b)(1)(C), 33 U.S.C. (Supp. II) 1369(b)(1)(C) 8, 13

ADMINISTRATIVE ACTIONS:

46 Fed. Reg. 9404 (Jan. 28, 1981)..... 9
49 Fed. Reg. 31212 (Aug. 3, 1984)..... 7
51 Fed. Reg. 4458 (Feb. 4, 1986)..... 4

REGULATIONS:

40 C.F.R. Part 257 11
40 C.F.R. 403.7..... 1
40 C.F.R. 403.7(e)(3)..... 5
40 C.F.R. 403.8(b)..... 5
40 C.F.R. 403.8(f) 5

LEGISLATIVE MATERIALS:

A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. (1978) 2, 12

S.1128, 99th Cong., 2d Sess. §406(a)(3), 132 Cong. Rec. H10, 551 (1986) 4

133 Cong. Rec. S17-18 (daily ed. Jan. 6, 1987)..... 4

H.R.1, 100th Cong., 1st Sess. §406(a)(3) and (e), 133 Cong. Rec. 210-211 (1987) 4, 7

MISCELLANEOUS:

Summary of Environmental Profiles and Hazard Indices for Constituents of Municipal Sludge: Methods and Results, U.S. EPA, Office of Water Regulations and Standards, July, 1985 4

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Chemical Manufacturers Association,
Chicago Ass'n. of Commerce and Industry, *et al.*,
Petitioners,

v.

Natural Resources Defense Council, Inc., *et al.*,
Respondents.

OPINION BELOW

The opinion of the court of appeals (CMA App. A-1 to A-69)[1] is reported at 790 F.2d 289.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345(d), are reproduced at CMA App. A-55 to A-57. The removal credits provision, 40 C.F.R. 403.7, is reproduced at CMA App. A-57 to A-69.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, directs EPA to control two types of industrial polluters: (1)

1. As used herein, "CMA App." refers to the appendix to the petition in No. 86-239. "CMA Pet." refers to the petition in No. 86-239 filed by the Chemical Manufacturers Association. "CACI Pet." refers to the petition in No. 86-608 filed by the Chicago Association of Commerce and Industry, *et al.* "EPA Br." refers to the Brief for the Federal Respondents in Opposition to both petitions.

"direct" dischargers, which pipe toxic wastewater directly into navigable waters, and (2) "indirect" dischargers, which pipe toxic wastes to publicly owned treatment works (POTWs) which, in turn, discharge to navigable waters.

Most POTWs are designed to treat conventional wastes, not industrial toxics. Industrial toxics can damage the POTW, pass through it to rivers and drinking water supplies, or contaminate its sludge. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 690-691 (1978) [hereinafter *1977 Legis. Hist.*]

Congress therefore directed EPA to set national "pretreatment" standards dramatically limiting the toxicity of industrial discharges to POTWs. 33 U.S.C. 1317(b)(1). Congress also told EPA to develop regulations to prevent industrial wastes from contaminating POTW sludge and to encourage productive use (i.e., recycling) of sludge. 33 U.S.C. 1345(d). Finally, because some POTWs can remove some toxics, Congress authorized EPA to approve "removal credits" or adjustments to national pretreatment standards at qualifying POTWs. 33 U.S.C. 1317(b)(1). Industries using these POTWs could then discharge larger quantities of toxics than would otherwise be allowed.

POTWs applying for authority to grant industry credits had to show: 1) that the POTW, in conjunction with industry, could reduce the toxics in its discharge to the same level as a direct discharger, and 2) that reliance on the POTW's treatment system would not produce unacceptably toxic POTW sludge. *Id.*

In 1978 EPA issued, and in 1981, in response to industry criticisms, revised, rules implementing the pretreatment provisions, including the removal credit authority. The Third Circuit upheld the removal credit portion of the rules against industry's challenge. *National Ass'n. of Metal Finishers v. EPA*, 719 F.2d 624 (1983) [hereinafter *NAMF*]. Industry sought this Court's review of some aspects of that decision, but did not take issue with the holding on removal credits. *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985) (reversing part of *NAMF* unrelated to removal credits).

Despite this seemingly final resolution, a few industry groups continued to criticize the removal credit rule. They argued that many POTWs were uninterested in credits, but might be induced to apply if EPA relaxed the requirements. To appease these concerns, in 1984 EPA relaxed every key component of its removal credit rule, making larger credits possible. CMA App. A-13 to A-14. On review, the Third Circuit held that: 1) the revised rule violated the plain language of the Clean Water Act, and 2) EPA had also acted arbitrarily and capriciously, given the rulemaking record. CMA App. A-19 to A-34 and A-46 to A-52.

The Chemical Manufacturers Association (CMA) seeks review of Part VI of the Third Circuit's decision holding that EPA may not approve removal credits without promulgating the sludge regulations which are a precondition to credits. The Chicago Association of Commerce and Industry *et al.* (CACI) joins CMA's petition and also seeks certiorari of Part III of the Third Circuit's decision holding that EPA's method of calculating a POTW's waste removal must comply with the statutory requirement that indirect dischargers (in conjunction with their POTW) meet the same pollution control standards as direct dischargers.[2] EPA and NRDC oppose both petitions.

REASONS FOR DENYING THE PETITIONS

The Third Circuit's decision does not present issues sufficiently important to warrant this Court's attention, does not conflict with the decisions of this Court or any other Circuit, and is required by both the express language of the statute and the legislative history. Review by this Court is not warranted.

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2. The Third Circuit also found other statutory violations which are not at issue here: 1) EPA ignored untreated sewer overflows in calculating a POTW's toxic waste "removal" and 2) EPA erred by allowing up to eight years of violative discharges before it had to withdraw approval for removal credits. CMA App. A-34 to A-46.

1. THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

a. The nub of CMA's petition is likely to be resolved before this Court can decide the case. The petition presents a single issue: may EPA authorize removal credits without issuing the sludge regulations required by Section 405 of the Act? EPA has pledged to resolve this issue by promulgating Section 405 rules. EPA Br. 9-10. Several intermediate rulemaking steps are already complete,[3] and EPA expects to propose the rules by August, 1987 or thereabouts. EPA Br. 10.

Congress[4] or the courts[5] may well force EPA to expedite this schedule. But even if they do not, the central feature of this controversy should dissolve during 1987.[6]

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3. For example, in July 1985, EPA produced an environmental profile document and hazard index for each of 50 toxics in municipal sludge. *Summary of Environmental Profiles and Hazard Indices for Constituents of Municipal Sludge: Methods and Results*, U.S. EPA, Office of Water Regulations and Standards. Last year, EPA sought public comment on proposed rules for state management of the federally mandated sludge program. 51 Fed. Reg. 4458 (Feb. 4, 1986).

4. Last session, both Houses of Congress unanimously passed the Water Quality Act of 1986, which directed EPA to *promulgate* the long overdue Section 405 sludge rules by August 31, 1987. S. 1128, 99th Cong., 2d Sess. §406(a)(3), 132 Cong. Rec. H.10,551 (1986). Although the President pocket-vetoed the bill, the House reapproved the identical legislation by a vote of 406 to 8 this session, H.R. 1, 100th Cong., 1st Sess. §406(a)(3), 133 Cong. Rec. 210 (1987), and Senate leaders have promised similar action, 133 Cong. Rec. S.17-18 (daily ed. Jan. 6, 1987) (statements of Senators Byrd and Dole on S.1, the Water Quality Act of 1987).

5. Section 405(d) of the Act set a 1978 deadline for EPA's sludge rules. Because EPA violated this deadline, a district court, under Section 505(a)(2) of the Act, 33 U.S.C. 1365(a)(2), can compel EPA to issue the rules at the earliest possible date. *See, e.g., NAMF*, 719 F.2d at 642, *rev'd in nonrelevant part, Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985); *Pennsylvania Dep't. of Environmental Resources v. EPA*, 618 F.2d 991, 1000 (3d Cir. 1980).

6. The Clean Water Act and the Administrative Procedure Act together require EPA to seek public comment on the proposed rules. 33 U.S.C. 1345(d) and 5 U.S.C. 553. EPA can issue final rules shortly thereafter. EPA will presumably give high priority to final promulgation of these rules. EPA has said that these rules will "substantially cure" any disruption to the pretreatment program. EPA Br. 9.

b. This case will temporarily affect at most a very small number—possibly only five—POTWs in the country. That is because Congress intended removal credits to be granted sparingly and only under stringent conditions. *See* CMA App. A-31 to A-32. Many POTWs cannot meet these conditions. The few who can are often unwilling to assume legal and financial responsibility for treating industry's wastes. *Id.* at A-24, n.12.

Consequently, only one of approximately 1500 eligible POTWs obtained EPA approval for removal credits which appear to comply with all but Section 405 of the Act; four others have pending applications which may similarly qualify. NRDC Appendix A-1 to A-7.[7]

c. The temporary impact of this case, even on the few affected POTWs, is quite limited. Contrary to CMA's assertion, removal credits are not "integral" to a pretreatment program. The essential components of the program—adequate legal authority, clearly defined administrative procedures, and adequate funding and personnel—had to be in place by July, 1983, long before any POTW sought removal credit authority. 40 C.F.R. 403.8(b) and (f).

The removal credit is simply a discretionary supplement to an otherwise functional program. That is precisely why EPA allows POTWs to apply for removal credit authority at any time — even well into program operation. *See* 40 C.F.R. 403.7(e)(3).

In that sense, this case differs substantially from *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). There, EPA argued that, although it rarely granted FDF variances, it nonetheless relied on their availability in establishing BAT and pretreatment standards. Neither EPA nor any petitioner claims

7. Eleven other POTWs received EPA approval to grant removal credits which EPA must now recall for reasons unchallenged by CMA: they either use an incorrect formula for calculating the POTW's pollutant "removal," or they do not account for combined sewer overflows, or both. In addition, ten POTWs have pending applications which fail for the same reasons. *Cf.* NRDC Appendix A-1 to A-7 *with* CMA App. A-19 to A-42. It is uncertain whether any of these POTWs will qualify for, or want, credits when EPA revises its removal credit rules to comply with the other, nonsludge related parts of the Third Circuit's decision.

such sweeping scope here. The pretreatment program could function perfectly well even if the Third Circuit's decision effectively precluded (which it did not), removal credits forever. The only consequence would be that all, rather than most, industries discharging to POTWs would have to meet national pretreatment standards.

d. This case will not affect industry as CMA had projected because of: 1) new developments, and 2) other avenues for relief.

1. CMA had argued that the chemical industry would face pretreatment standards in December, 1986, nine months before EPA issued sludge rules. CMA complained that, during the nine month interval, CMA could not judge its eligibility for removal credits. Hence, CMA would have to design treatment technology to meet standards unmitigated by any removal credit adjustment—or risk violating the statutory three year pretreatment compliance deadline. CMA Pet. 11-12.

EPA has since alleviated CMA's dilemma. EPA postponed pretreatment standards for the chemical industry until August 31, 1987, virtually the identical deadline for proposed sludge rules.[8] EPA also warned that the chemical industry standards may lag even more because of data gaps in that rulemaking record.[9] Hence, CMA will know[10] what its likely removal credit obligations are at the same time as—or in advance of—the date it must begin developing compliance plans.[11]

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8. EPA's deadline for chemical industry pretreatment standards is set by a Consent Order. The district court recently modified the Consent Order to extend the deadline for these standards to August, 1987. *NRDC v. Thomas*, Civ. Nos. 2153-73, 75-012, 75-1698, 75-1267 (D.D.C. Jan. 7, 1987).

9. EPA predicts potential delay due to the lack of any data in the rulemaking record on metals removal at certain chemical plants. *Id.*, Motion to Modify Paragraph 7(b) of Consent Decree.

10. As noted earlier, CMA can bring a district court action to compel EPA to promulgate final sludge rules shortly after the August, 1987 proposal. In addition, Congress or the courts may well force EPA to expedite its current rulemaking schedule. *See* p. 4 and n. 4, 5, and 6, *supra*.

11. CMA speculates, without citation to the record, that removal credits will substantially reduce the industry's compliance costs. CMA Pet. 11. This assumes, contrary to history, that most affected POTWs will both want, and qualify for, credits. It also assumes that the credits will be sufficiently large to

2. Only a small percentage of industrial facilities subject to pretreatment standards have shown any interest in removal credits. The statutory compliance deadline for many of these facilities is already past or soon will be. *See* NRDC Appendix A-8 to A-12. Hence, many seek removal credits not, as CMA suggests, to comply diligently (the date for that is already past), but rather to avoid enforcement for failing to install the same pollution controls as their competitors.[12]

This Court need not invoke its jurisdiction to help Clean Water Act violators escape enforcement. Admittedly, a few facilities may have relied in good faith on removal credits approved prior to the Third Circuit's decision.[13] According to EPA, the forthcoming sludge rules should "alleviate the[ir] principal burdens." EPA Br. 7. Congress may also afford these facilities express relief,[14] but even if Congress does not, they are unlikely

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allow chemical plants to install entirely different, and cheaper, pollution controls than anticipated in the pretreatment standards. There is nothing in the record to support these assumptions. The projected savings from "national" removal credits, CMA Pet. 11, n. 8, refer to rulemaking options which EPA rejected as flatly illegal. *See* 49 Fed. Reg. 31212-31213 (Aug. 3, 1984). They have nothing to do with this case.

12. Many removal credit applications were not filed until less than one year before the industrial compliance deadline. *Cf.* NRDC Appendix A-6 to A-7 *with* NRDC Appendix A-8 to A-12. Credits are then "too late" for an industrial facility which had intended to comply with the deadline because, by then, such a facility would already have purchased its pollution controls. *See* CMA Pet. 12 and n. 9.

13. Categorical pretreatment standards cover roughly 14,000 industrial facilities. EPA had approved credits which comply with all but the sludge requirements of the Clean Water Act for one POTW with only 38 affected facilities. EPA had also approved other credits which violate aspects of the Third Circuit's decision which are unchallenged here. It is unclear whether interest continues in the latter credits, many of which involved facilities with less than a year til their compliance deadline. *See* NRDC Appendix A-1 to A-4 and n. 12, *supra*.

14. Proposed amendments to the Clean Water Act would grant only POTWs with either approved credits or pending credit applications a stay of the sludge requirements of Sections 307(b)(1) and 405(d) of the Act until August 31, 1987, the date by which the bill requires EPA to issue final sludge rules. H.R.1, 100th Cong., 1st Sess. §406(e), 133 Cong. Rec. 211 (1987). See n. 4, *supra*, for a discussion of the status of this legislation.

to suffer. *See , e.g. , General Motors Corp. v. EPA*, 738 F.2d 97, 101 (3d Cir. 1984) (in a closely analogous situation, EPA emphasized that "good faith efforts to achieve compliance will be taken into consideration by the agency in enforcement actions addressed to *specific instances* of noncompliance.")

2. THE THIRD CIRCUIT CORRECTLY DECIDED THAT IT HAD JURISDICTION TO REVIEW THESE RULES.

Below, CMA expressly conceded that the Third Circuit had jurisdiction to review a timely challenge to these rules.[15] Now CMA postulates a directly contradictory theory: that jurisdiction fails because this case allegedly constitutes a challenge to the adequacy of Section 405 sludge regulations. CMA's new-found theory gives rise, in its view, to a conflict between the Third Circuit's decision and general mandates from this and the courts of appeals to stay within statutory bounds on jurisdiction. *See* CMA Pet. 13-16.

EPA disagrees with CMA's new-found theory, as well it should. *See* EPA Br. 7-8. As EPA explains, the issue before the Third Circuit was not whether to compel EPA to promulgate Section 405 sludge regulations. Instead, the Third Circuit had to decide whether Section 307(b) of the Act authorized the pretreatment rules EPA had adopted. Section 509(b)(1)(C) explicitly directs "[r]eview of the Administrator's action . . . in promulgating any . . . pretreatment standard under section 307" exclusively to the courts of appeals. 33 U.S.C. (Supp. II) 1369(b)(1)(C). There can be no question that the Third Circuit properly invoked its jurisdiction.

Both CMA and EPA join in criticizing the timeliness of NRDC's challenge to these rules, though EPA believes that the question turns on the unique facts of this case and is "relatively unimportant." *See* CMA Pet. 16-17 and EPA Br. 8. We agree that the jurisdictional question is tied to unusual facts. However,

15. CMA's Brief to the Third Circuit admitted: "With the exceptions noted in respondent's EPA's brief [i.e., to the timeliness of the case only], *this Court has jurisdiction over this case under §509(b)(1) of the Act*." p. 1 (emphasis added). We discuss CMA's and EPA's objections to timeliness below.

we also believe that the Third Circuit correctly applied the relevant law. Three facts support the Third Circuit's decision.

First, the new rule enabled POTWs to grant more and larger credits, significantly reducing the degree of required pretreatment. CMA App. A-14. This, in turn, forecasted greater sludge contamination, a development sufficient in itself to trigger jurisdiction. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1033 (7th Cir. 1984) ("waiting to see if regulation will really pinch before challenging it in court" is permissible); *Tanner's Council of America, Inc. v. Train*, 540 F.2d 1188, 1196 (4th Cir. 1976) (post-90 day review permissible).

Second, the Third Circuit found that EPA had reproposed for public comment, and then repromulgated, the entire removal credit rule, significantly changing the provisions purporting to implement Section 405 of the Act. CMA App. A-48.

Finally, Section 509(b)(1) of the Act allows challenges based on "grounds which arose after [the] ninetieth day" from promulgation of a rule. 33 U.S.C. (Supp. II) 1369(b)(1). The Third Circuit found: a) EPA had now fallen nine years, rather than one, behind its statutory deadline; b) it was now abundantly clear (as it had not been earlier)[16] that sludge rules were well over a year away from the court's decision; and c) a newly released EPA study and even more recent correspondence from the EPA Administrator to the Chairman of the Senate Oversight Committee documented EPA's failure to issue Section 405 sludge rules. CMA App. A-49 to A-52. These facts afforded the Third Circuit ample bases for jurisdiction.

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16. NRDC could not have raised this issue as to EPA's 1978 rule since, at that time (June 26, 1978), EPA had not yet missed the one-year statutory deadline. When the removal credit rule was reissued in 1981, both EPA and NRDC expected that additional Section 405 regulations would be forthcoming shortly. *See* 46 Fed. Reg. 9404, 9410 (Jan. 28, 1981). NRDC could not then have been charged with knowledge that EPA would completely renege for many more years on its statutory obligation.

3. THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE CLEAN WATER ACT PROHIBITS EPA FROM APPROVING REMOVAL CREDITS IN TOTAL DISREGARD OF SECTION 405 OF THE ACT.

The Third Circuit framed its analysis according to the standard of review articulated in three recent decisions of this Court: *Chemical Manufacturers Ass'n. v. EPA*, 470 U.S. 116 (1985) (interpreting the Clean Water Act); *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); and *Motor Vehicle Manufacturers' Ass'n. of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). The court afforded EPA "the utmost deference," looking only to see that EPA's interpretation of the Clean Water Act was "sufficiently rational" to be upheld. CMA App. A-7 and A-15 to A-19.

Section 307(b)(1) of the Act states plainly: EPA may authorize removal credits only if they do not "prevent sludge use or disposal by such works in accordance with section 405 of this Act." 33 U.S.C. 1317(b)(1). Section 405, in turn, requires EPA *by December, 1978* to publish

> regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall - (1) identify uses for sludge, including disposal; (2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs); (3) identify concentrations of pollutants which interfere with each such use or disposal.

33 U.S.C. 1345(d).

There are five major methods of sludge use or disposal.[17] The statute requires EPA to set concentration limits for each of the 100 or so[18] pollutants found in POTW sludge and for each use

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17. The five major methods are: landfill, incineration, land spread, ocean dumping, and distribution and marketing. CMA App. A-50 and n. 26.

18. CMA App. A-50.

or disposal method. EPA issued Section 405 regulations for only two pollutants and then only for two of the five common disposal methods.[19]

CMA argues that EPA can nonetheless authorize removal credits for any pollutant or disposal method. Under CMA's theory, if regulations issued under other statutes cover a POTW's chosen sludge disposal method (and a few do), those regulations can substitute for Section 405 regulations — without so much as a finding by the agency that the other regulations accomplish the objectives of Section 405. If, as is more likely the case, no federal regulations govern the POTW's disposal of sludge contaminated with a particular pollutant, then, CMA theorizes, EPA can grant removal credits unfettered by any of the constraints on sludge disposal in Sections 307(b)(1) and 405 of the Act. CMA Pet. 18-20.

The Third Circuit correctly found that CMA's theory violated: a) Section 405's explicit directive that EPA issue sludge rules for *each* use or disposal option, b) Section 405's equally explicit directive that EPA issue sludge rules for *each* pollutant of concern in POTW sludge, c) Section 405's statutory deadline for sludge rules by December, 1978, and d) "the congressional goal of making sludge into a productive asset rather than a toxic liability." CMA App. A-10 and A-46 to A-52. In short, the court

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19. *Id*. at A-51 to A-52. CMA claims that EPA has issued sludge rules under both Section 405 and other federal statutes. CMA Pet. 19 and n. 16. This is relatively simple to refute. The Court need only compare the content of the rules mandated by Section 405(d) with those CMA cites. Section 405(d) requires EPA to regulate *each* use or disposal method and all pollutants which interfere with such methods. CMA cannot name a *single pollutant* regulated for *each* disposal method. No regulation indicates what concentrations will prevent beneficial *use* of sludge. CMA App. A-51. And only one of EPA's rules—the limited rule referenced in the text—even purports to be issued under authority of Section 405(d). 40 C.F.R. Part 257.

In any event, the EPA Administrator has twice acknowledged EPA's failure to promulgate the Section 405 rules. CMA App. A-51 to A-52. EPA's own report concedes: "no meaningful sludge criteria" exist. Joint Appendix at 200, 204, *NRDC v. EPA*, 790 F.2d 289 (3d Cir. 1986) (No.84-3530). And EPA has now promised to promulgate the nonexistent Section 405 regulations. EPA Br. 9-10.

held that EPA cannot ignore the plain language of Section 405 and nonetheless purport to act "in accordance with" that section as the Clean Water Act commands.[20]

Although the Third Circuit did not discuss the legislative history,[21] that history confirms the court's Opinion. Congress wanted removal credits, by definition, to reflect pollutant "reduction" or "removal." *1977 Legis. Hist., supra*, at 271, 461 (Conf. Rep. and Sen. Muskie, respectively). Congress decided that pollutants *"are not considered to be removed"* where they contaminate sludge. *Id.* at 690 (S. Rep.) (emphasis added). Without Section 405 rules, EPA has no way of knowing whether pollutants simply move from water to sludge in direct violation of Congress's purpose. *See id.* at 691 (S. Rep.). Hence, EPA cannot say there is any "removal" — or any basis for a credit.

CMA cites Section 405(e) of the Act, 33 U.S.C. 1345(e), which gives POTWs authority to decide how to dispose of sludge provided they comply with any EPA guidelines. CMA reads that section as negating Congress's express directive to EPA, in subsection 405(d), to issue sludge rules by 1978. CMA Pet. 20-22.

Subsection (e) is wholly consistent with the clear and specific language of Section 405(d). Section 405(e), unlike subsection (d), took effect immediately on enactment. It gave POTWs interim authority to dispose of sludge until EPA issued sludge guidelines. It recognized that municipal treatment inevitably

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20. CMA takes issue with the Third Circuit's language indicating that Section 405(d) mandates a "comprehensive framework" of rules. CMA Pet. 18-22. The words "comprehensive framework" are simply a shorthand description of the requirements clearly and specifically set forth in Section 405(d). No regulations exist which meet the requirements of Section 405(d). *See* n. 19, *supra*.

21. EPA criticizes the court's "blanket reliance" on the Senate Report to decide the relationship between Section 307(b) and Section 405. EPA Br. 9. EPA is wrong on two counts. First, the court discusses the Senate Report solely in reference to an entirely different point raised by CACI's petition (i.e., the degree of pollutant removal needed to justify a credit). *See* CMA App. A-31. That discussion is not relevant to Part VI of the Court's Opinion on sludge requirements. Second, contrary to EPA's suggestion, the Conferees did, in fact, adhere to the Senate's concern that pretreatment standards require actual pollution "reduction," not mere shifting of toxics to POTW sludge. *1977 Legis. Hist., supra*, at 271-272 (Conf. Rep.).

produces sludge; POTWs had to dispose of this sludge and could not await EPA guidelines. By contrast, removal credits are not inevitable or mandatory; they exist purely at the discretion of the POTW. 33 U.S.C. 1317(b). But removal credits, if granted, can "not prevent sludge use or disposal . . . in accordance with section 405." *Id*. This is a flat prohibition, unlike Section 405(e). It ensures that removal credits, which are not inevitable, do not compromise sludge use or disposal, which is inevitable. In short, to the extent relevant, Section 405(e) actually supports the Third Circuit's decision.

4. THE THIRD CIRCUIT CORRECTLY DECIDED THAT EPA CANNOT AUTHORIZE REMOVAL CREDITS WHICH DIRECTLY VIOLATE SECTION 307(b)(1) OF THE CLEAN WATER ACT.

While CACI's petition is by no means clear, CACI appears to take issue with the Third Circuit's ruling that removal credits cannot exceed the amount of toxics *consistently*[22] removed by the POTW. CACI asserts that: 1) such matters are more appropriately resolved by a district court, and 2) as a policy matter, compliance with the POTW's NPDES permit[23] should suffice for credits even if it equates to less control than that required of direct dischargers. CACI Pet. 5-9.

CACI's complaints are more appropriately addressed to the Congress than to this Court. Section 509(b)(1)(C) of the Clean Water Act gives the courts of appeals exclusive jurisdiction to review EPA pretreatment standards such as those at issue here. 33 U.S.C. (Supp. II) 1369(b)(1)(C). Likewise, Section 307(b)(1) of the Act specifies that the indirect discharge of pollutants through a POTW must "not violate that effluent limitation or standard

22. CACI uses the term "daily and monthly limits" to refer to what the Third Circuit called "consistency" of pollutant removal. *See* CMA App. A-19 to A-20. For a discussion of the significance of both daily and monthly limits in achieving consistent removal, see CMA App. A-27 to A-32.

23. The Act requires each POTW and direct discharger to have a permit, commonly referred to as the "NPDES" permit. 33 U.S.C. 1311(a) and 1342. Permits for POTWs require secondary treatment. 33 U.S.C. 1311(b)(1)(B).

which would be applicable to such toxic pollutant if it were discharged by [a direct discharger]." 33 U.S.C. 1317(b)(1). This is an additional requirement to the NPDES permit for secondary treatment because secondary treatment "cannot deal adequately with toxic[s]." CMA App. A-7 to A-8 and n. 2.

Since effluent limitations for direct dischargers regulate both the overall amount of toxics discharged as well as the consistency of pollutant removal, Section 307 compels EPA to consider both amount and consistency of pollutant removal in authorizing removal credits. If the Chicago POTW can achieve the pollution reduction it claims, it should have no trouble meeting the consistency requirement. *See* CMA App. A-24, n. 12.[24] But if it cannot, neither the Third Circuit nor this Court can jettison the plain command of the statute in favor of CACI's preferred policy choice. However, EPA may be able to alleviate CACI's concern about the availability of removal credits with more carefully developed regulations. EPA urges this Court to refrain from granting certiorari while the agency attempts to do so. EPA Br. 10-11. We agree.

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24. CACI's real concern appears to be not so much consistency as the measurement and reporting requirements for credits. *Id.* and CACI Pet. 3. The latter, of course, are not at issue here. In addition, Chicago's removal credit application appears to run afoul of the requirement for a combined sewer overflow adjustment. *Cf.* NRDC Appendix A-5 to A-7 *with* CMA App. A-34 to A-42.

CONCLUSION

The petitions for certiorari should be denied. If the Court nonetheless grants any of the petitions, we respectfully urge the Court to specify which of the two principal questions (i.e., sludge or consistent removal requirements) the Court will review.

Respectfully submitted,

Frances Dubrowski
Counsel for the Natural Resources
Defense Council, Inc.
1350 New York Avenue, N.W.
Washington, DC 20005
(202) 783-7800

January 16, 1987

APPENDIX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of General Counsel

June 25, 1986

Frances Dubrowski, Esq.
Natural Resources Defense Council
1350 New York Avenue, N.W.
Suite 300
Washington, D.C. 20005

Re: *NRDC v. EPA*, 7th Cir. (sic) (No. 84-3530)

Dear Fran:

Enclosed in response to your June 23, 1986 information request is the attached three-page listing of "POTWs with Approved Removal Credits." We believe that this responds fully to your request.

Please note that twelve POTWs have been granted removal credits, while EPA's petition for rehearing incorrectly stated that there were thirteen approvals. We will be filing an errata sheet with the court.

Sincerely,

Dov Weitman
Attorney

Enclosure

cc: All Counsel

POTWS WITH APPROVED REMOVAL CREDITS

1. *Buffalo, NY* — approved 7/19/85; combined sewer system (no CSO calculation).

   Pollutants: cadmium, zinc, chrome, copper, lead, nickel, silver, total metals

   Industry Categories (No. of Facilities):

Electroplating	(20)
Metal Finishing	(15)
Pharmaceutical Mfg.	(4)
Iron & Steel	(4)
Copper Forming	(1)

   Used 1984 regulation to calculate credits.

2. *Monroe County, NY* — approved 9/16/85; operates three plants — #1 is combined sewer system (no CSO calculation) and #s 2 and 3 have separate storm sewers.

   Pollutants: cadmium, chrome, copper, lead, silver, nickel, zinc, total metals.

   Industry Categories (No. of Facilities):

Electroplating/ Metal Finishing	(37)
Coil Coating	(1)
Aluminum Forming	(1)

   Used 1984 regulation to calculate credits.

3. *Memphis, TN* — approved 11/26/84; operates two plants, both have separate storm sewers.

   Pollutants: cadmium, cyanide, lead, chrome, copper, nickel, silver, zinc, arsenic.

   Industry Categories (No. of Facilities):

Electroplating	(9)
Metal Finishing	(5)
Battery Mfg.	(1)
Copper Forming	(1)

   Used 1984 regulation to calculate credits.

4. *Galesburg, IL* — approved 4/9/86; separate storm sewers.
   Pollutants: chrome.
   Industry Categories (No. of Facilities):
   Metal Finishing (1)
   Used 1984 regulation to calculate credits.

5. *Rockford, IL* — approved 5/30/84; separate storm sewers.
   Pollutants: chrome, copper, lead, nickel, zinc, total metals.
   Industry Categories (No. of Facilities):
   Electroplating (12)
   Metal Finishing (26)
   Used 1981 regulation to calculate credits.

6. *Speedway, IN* — approved 6/20/85; combined sewer system (no CSO calculation).
   Pollutants: chrome, zinc.
   Industry Categories (No. of Facilities):
   Metal Finishing (1)
   Used 1984 regulation to calculate credits.

7. *Kenosha, WI* — approved 9/6/85; separate storm sewers.
   Pollutants: lead, zinc, nickel, chrome.
   Industry Categories (No. of Facilities):
   Electroplating (1)
   Metal Finishing (5)
   Copper Forming (1)
   Foundries (2)
   Plastic Molding & Forming (1)
   Used 1984 regulation to calculate credits.

8. *Milwaukee MSD, WI* — approved 8/27/85; combined sewer system (no CSO calculation).
   Pollutants: chrome
   Industry Categories (No. of Facilities):
   Leather Tanning (15)
   Used 1984 regulation to calculate credits.

9. *Racine, WI* — approved 9/26/85; separate storm sewers.
   Pollutants: lead, zinc.
   Industry Categories (No. of Facilities):
   Electroplating (6)
   Metal Finishing (15)
   Used 1984 regulation to calculate credits.

10. *Sheboygan, WI* — approved 6/6/85; separate storm sewers.
    Pollutants: chrome
    Industry Categories (No. of Facilities):
    Electroplating (1)
    Metal Finishing (9)
    Aluminum Forming (2)
    Leather Tanning (2)
    Used 1984 regulation to calculate credits.

11. *Gulf Coast Waste Disposal Authority, TX,* — approved 7/12/85; separate storm sewers.
    Pollutants: oil & grease; ammonia.
    Industry Categories (No. of Facilities):
    Petroleum Refining (2)
    Used 1984 regulation to calculate

12. *Albuquerque, NM* — approved 9/21/85; separate storm sewers.
    Pollutants: cadmium, chrome, copper, lead, nickel, zinc, total metals.
    Industry Categories (No. of Facilities):
    Electroplating/ Metal Finishing (between 25-35)
    Used 1984 regulation to calculate credits.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of General Counsel

December 30, 1986

Frances Dubrowski, Esq.
Natural Resources Defense Council
1350 New York Avenue, N.W.
Suite 300
Washington, DC 20005

Re: *NRDC* v. *EPA*, No. 84-3530

Dear Fran:

This is in response to your August 4, 1986 letter requesting information concerning POTWs which have been granted or have applied for removal credits authority.

A. *POTWs granted removal credits authority*

1. As best as we can determine, there has been no overlap or "doublecounting" of electroplaters and metal finishers.

2. Since pounds of pollutants are not set forth in removal credits applications, EPA does not have information on the number of pounds involved in each removal credit.

3. 22 facilities (21 electroplaters and 1 non-ferrous metals) have removal credits in Albuquerque, N.M. (The original estimate was based upon a review of the permit application. The current information is based upon a recently conducted on-site audit.)

4. The information provided on June 25, 1986 has not changed.

B. *POTWs that have applied for removal credits authority*

The information set forth below is believed to be generally accurate. They may be some minor errors; if any, however, we believe they are minimal. We list below each of 14 POTWs who have applied, and separately answer your questions for each city.

Please note that none of these POTWs performed a CSO adjustment explicitly. (However, some of them do not have combined sewers.)

NAME	DATE OF APPLICATION	POLLUTANTS COVERED	FACILITIES COVERED	COMBINED SEWERS?	REGS USED
Hartland ME	6/28/84	Cr	LT (1)	?	1981
Kanawanda NY	?	Phenol	I&S (1)	?	1984?
Manitowic WIS	2/8/84	Cr, Cu, Pb, Hg, Cn	EP (1) MF (12) Inorg (1) NFM (1)	No	1981
Sauget IL	10/29/85	Cu, Pb, Ni, Zn, Cd, Cr	CF (1) NFM (2)	Yes	1984
Watertown WIS	6/84	Cd, Cr, Cu, Ni, Zn	EP (2) MF (2)	Yes	1981
Middletown OH	1/24/84	Ammonia Phenol	I&S (1)	Yes	1984?
Indianapolis IN	12/85	N, Cr, Cn, Cu, Ni, Pb, Phenol, Zn, O&G, Metals	I&S (1) E&EC (1) PR (3) Timber (3) PE (1) EP/ MF (36)	Yes	1984
Freeport IL	10/7/85	Cu, Zn, Cd, Ni, Cr	MF (1)	No	1984
Fond du Lac WIS	5/31/85	Cr	EP (5) MF (4) LT (1)	?	1984

NAME	DATE OF APPLICATION	POLLUTANTS COVERED	FACILITIES COVERED	COMBINED SEWERS?	REGS USED
S. Milwaukee WIS	8/28/85	Cr	LT (1) MF (4)	?	1984
Grand Haven MI	1/84	Cr	LT (1)	?	1981
Chicago IL	6/28/84	Cr, Cu, Cn, Pb, O&G, Zn, Phenol Metals	EP (142) MF (137) I&S (39)	Yes	1984
Orange County CA	3/84	Cd, Pb, Ni, Zn, Ag	EP (169) MF (76)	No	1981
Stockton CA	1/30/85	Cd, Cr, Cu, Pb, Ni, Zn Ag	EP (?)	No	1984

If you have any further questions, please call.

Sincerely,

Dov Weitman

EFFLUENT GUIDELINES DIVISION
FINAL RULES - PRIMARY CATEGORIES
(1979 - Present)

NATIONAL PRETREATMENT STANDARDS
COMPLIANCE DEADLINES

11/12/85
(Revised)

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES[1]

INDUSTRY	PSES COMPLIANCE DEADLINE
ALUMINUM FORMING	10/24/86
BATTERY MANUFACTURING	03/09/87
COAL MINING	NO KNOWN INDIRECT DISCHARGERS
COIL COATING Phase I	12/01/85
COIL COATING Phase II (Canmaking)	11/17/86
COPPER FORMING	08/15/86
ELECTRICAL/ELECTRONIC COMPONENTS Phase I	07/01/84 A 11/08/85 A
ELECTRICAL/ELECTRONIC COMPONENTS Phase II	07/14/86 B
ELECTROPLATING	04/27/84 C 06/30/84 C 07/15/86 C
INORGANIC CHEMICALS Phase I	08/12/85 D

1. Irrelevant material in original has been omitted here (i.e., 40 C.F.R. Part, date of Administrator's signature of rule, Federal Register citation, effective date of rule).

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES

INDUSTRY	PSES COMPLIANCE DEADLINE
INORGANIC CHEMICALS Phase II	08/22/87 E 06/29/85 E 07/20/80 E
IRON & STEEL MANUFACTURING	07/10/85
LEATHER TANNING & FINISHING	11/25/85
METAL FINISHING	06/30/84 F 07/10/85 F 02/15/86 F
NONFERROUS METALS Phase I	03/09/87
NONFERROUS METALS Phase II	09/20/88
NONFERROUS METALS FORMING	08/23/88
ORE MINING	NO KNOWN INDIRECT DISCHARGERS
PESTICIDES	11/10/88
PETROLEUM REFINING	03/23/80
PHARMACEUTICALS	10/27/86
PLASTICS MOLDING & FORMING	NO CATEGORICAL STANDARDS H
PORCELAIN ENAMELING	11/25/85
PULP & PAPER	07/01/84
STEAM-ELECTRIC POWER PLANTS	07/01/84

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES

INDUSTRY	PSES COMPLIANCE DEADLINE
TEXTILE MILLS	NO CATEGORICAL STANDARDS J
TIMBER	01/26/84 K

KEY:

A. *Electrical/Electronic Components* (Phase I):
July 1, 1984 for TTO (Subparts A & B); November 8, 1985 for Arsenic (Subpart B).

B. *Electrical/Electronic Components* (Phase II):
Compliance date of July 14, 1987 corrected to read July 14, 1986 (Subpart C — to control specific toxic metals, flouride, and TTO).

C. *Electroplating:*
4/27/84 for Metals and Cyanide (nonintegrated plants); 6/30/84 for Metals and Cyanide (integrated plants); 7/15/86 for TTO based on management practices followed by precipitation/clarification).

D. *Inorganic Chemicals* (Phase I):
PSES established only for Subparts F1, AH, AJ, AU.

E. *Inorganic Chemicals* (Phase II):
July 20, 1980 for Subparts A, B, L, AL, AR, BA, and BC; August 22, 1987 for Subparts AJ, AU, BL, M, BN, and BO, except for discharges from copper sulfate or nickel sulfate manufacturing operations;
June 29, 1985 for discharges from copper sulfate or nickel sulfate manufacturing operations and all Subparts in Part 415 not listed above.

F. *Metal Finishing:*

6/30/84 for TTO limit based on management practices only, except for plants covered by Part 420; 7/10/85 for TTO limit based on management practices only for plants covered by Part 420; 2/15/86 for Metals, Cyanide, and TTO based on management practices followed by precipitation/clarification).

G. *Pharmaceuticals:*

The effective date does not apply to provisions which allows (sic) facilities not using or generating cyanide to certify to that effect instead of monitoring for cyanide (Sections 439.14-17, .24-.27, .34-.37, and .44-.47).

H. *Plastics Molding and Forming:*

No categorical standards have been established; all indirect dischargers are required to comply with the General Pretreatment Regulation (40 CFR Part 403).

I. *Pulp and Paper:*

The effective date does not apply to sections that allow facilities not using chlorophenolic biocides or zinc hydrosulfite to certify to that effect instead of monitoring for PCB an (sic) TCP, which are effective May 18, 1983 (48 FR 31403, July 8, 1983; Reporting and Recordkeeping Requirements, OMB Approval, Technical Amendments).

J. *Textile Mills:*

No categorical standards have been established; all indirect dischargers are required to comply with the General Pretreatment Regulation (40 CFR Part 403).

K. *Timber Products Mfg.:*

Compliance established for Subparts F, G, and H only; the regulation reaffirms compliance with the General Pretreatment Regulation (40 CFR Part 403) for all other remaining Subparts.